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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 601.

M. HAMPTON MAGRUDER, COLLECTOR OF INTERNAL REVENUE,

Petitioner,

vs.

WASHINGTON, BALTIMORE AND ANNAPOLIS REALTY CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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The Daily Record Co. Print, Baltimore.

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OPINIONS BELOW.

The opinion of the District Court (R. 5-11) is reported at 35 F. Supp. 340. The opinion of the Circuit Court of Appeals (R. 12-16) affirming the decision of the District Court, is reported in 120 F. (2d) 441.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on June 10, 1941. The petition for writ of certiorari was filed on September 10, 1941. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Whether the taxpayer, a liquidating corporation, was "carrying on or doing business" within the meaning of Section 105 of the Revenue Act of 1935 and Section 401 of the Revenue Act of 1936.

STATUTE AND REGULATIONS INVOLVED.

The statute and regulations involved are set forth in the appendix, *infra*, pages 9-11.

STATEMENT.

For a brief but comprehensive and accurate summary of all of the salient facts in this case, the respondent calls attention to the findings of the District Court (R. 1-3) which is hardly longer than the statement in petitioner's brief (pp. 4-6). The following facts are not fully stated in petitioner's brief: The respondent at no time had an office of its own and had no one in its regular employment except an auditor who was paid a nominal annual salary (R. 3, 7). All of the respondent's activities have been directed toward the prompt liquidation of its assets, which was materially accomplished during the four taxable years in question (R. 3, 7, 15). The respondent's sole source of income has been from properties held by it for liquidation. This income was never reinvested or otherwise employed for profit, but promptly distributed to stockholders (R. 3, 7, 14-15).

REASONS FOR DENYING THE WRIT.

1. The Principles Involved Have Already Been Established by This Court and No Important Question Is Therefore Presented by This Decision.

As in substance admitted in the petitioner's brief (p. 7), the question of whether or not specified corporate activities are sufficient or are of such a nature as to constitute "carrying on or doing business" calls for the application of established principles to the facts under review, and generally does not warrant certiorari. The decision in each case must depend upon the particular facts before the Court. *Von Baumbach* v. *Sargent Land Co.*, 242 U. S. 503, 516. This Court, having laid down the principles to be followed,[1] and recognizing that each case depends upon its particular facts, has consistently refused during the last fifteen years to grant certiorari in cases arising under the capital stock tax statutes.

The statement in the petition that the instant question is raised in about one hundred cases now pending in the Bureau is not surprising when it is borne in mind that the words "doing business" are not susceptible of an exact legal definition and that the decision in each case is to be determined by the facts of that particular case. It is noteworthy that it is not alleged how many cases were pending in the Bureau prior to this decision, nor whether any claims for refund have been filed as a result of this decision.

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[1] *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187; *McCoach* v. *Minehill & S. H. R. R. Co.*, 228 U. S. 295; *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U. S. 28; *Von Baumbach* v. *Sargent Land Co.*, 242 U. S. 503; *Edwards* v. *Chile Copper Co.*, 270 U. S. 452; *Phillips* v. *International Salt Company*, 274 U. S. 718. See also *United States* v. *Pyne*, 313 U. S. 127, in which four of the above cases were cited.

2. There Is No Conflict in the Decisions of the Courts.

The respondent submits that there is no decision of any Court in conflict with the decision in this case. The case of *Edgar Estates Corporation* v. *United States*, 65 C. Cls. 415, cited in the petition (p. 9), is distinguishable from the case at bar on the same grounds on which the *Edgar Estates* case was distinguished in *Johnson's Estate* v. *United States*, 37 F. Supp. 617, 624 (C. Cls., 1941), namely:

> "In that case (*Edgar Estates* case) it appeared that the plaintiff purchased and sold stock at a profit and it was held that considering all the activities of the corporation a degree of business activity was maintained within the meaning of the Revenue Law although the amount of business done was small."

The Court holding that Johnson's estate was not taxable further said, at page 624:

> "Only the holding, owning and selling of real estate remained, and the principal purpose was not profit but to liquidate the estate."[1]

This recent decision makes it clear that no conflict exists between the decisions of the Court of Claims and the decisions of other courts.

Other cases which have held that corporations engaged in liquidating assets are not doing business within the meaning of the capital stock tax statutes are: *Union Land and Timber Company* v. *United States*, 65 C. Cls. 129; *Clallam Lumber Co.* v. *United States* (3 cases), 34 F. (2d) 944; 34 F. (2d) 947, and 37 F. Supp. 542.[2]

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[1] This language is much like that used by this Court in *Von Baumbach* v. *Sargent Land Co.*, 242 U. S. 503, 516. See also *McCoach* v. *Minehill and S. H. R. R. Co.*, 228 U. S. 295, 308.

[2] The first two Clallam Lumber Co. decisions were handed down in 1927 and 1929, respectively, from which the Government did not appeal. The Union Land and Timber Company case was decided in 1928.

3. Article 43(a)(5) of Treasury Regulations 64 Is Not in Accord With the Proper Interpretation of the Revenue Act.

The Courts below both so held (R. 11, 16). It is axiomatic that a regulation may not extend the plain meaning of ordinary words used in a statute. This is because the power—

> "* * * to prescribe rules and regulations * * * is not the power to make law * * * but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute is a mere nullity." *Manhattan Co.* v. *Commissioner*, 297 U. S. 129, 134.

Also, while re-enactment of a statute, without substantial change, subsequent to the promulgation of Treasury regulations, may import a legislative approval of such regulations, it remains true that—

> "* * * where the law is plain the subsequent reenactment of a statute does not constitute adoption of its administrative construction." *Biddle* v. *Commissioner*, 302 U. S. 573, 582.

The words "carrying on or doing business", when considered in the light of the decisions of this Court, have a meaning which does not include the owning, holding and liquidation of property, and in consequence, rules and regulations which purport to extend the meaning of these words to include such items are void and of no effect. While some of the language of the regulations is taken from the opinions of this Court, Article 43(a)(5) and several other provisions in the Regulations are contrary to the judicial construction of the

statute.[1] Furthermore, Article 43(a)(5), as the petitioner seeks to apply it to the respondent, is inconsistent with Article 43(b)(2)[2], which is in conformity with the opinions of this Court, since the "orderly liquidation of property" necessarily involves "owning and holding" it and distributing "the avails". This inconsistency in the Regulations alone is sufficient reason for holding that Article 43(a)(5) is entitled to little consideration in construing the statute. *Estate of Sanford* v. *Commissioner*, 308 U. S. 39, 49; *Burnet* v. *Chicago Portrait Co.*, 285 U. S. 1, 16, 20.

The unimportant part played by the regulations in construing the capital stock tax statutes is evidenced by the absence of any references to them in the opinions of the Courts.

Finally, it is inconceivable that Congress could have intended by the use of the words "carrying on or doing business" to have adopted the detailed and inconsistent interpretation given to such words by Articles 42 and 43 of the Regulations. This statute is distinctly not of the type which can be amended by an adoption of prior regulations which purport to cover each specific situation. It is apparent that there can be no more precise delimitation of the transactions embraced within the concept of the words "carrying on or doing business", than there can be in relation to fraud, undue influence, due process of law, contemplation of death, or other familiar legal concepts which are applicable to many varying circumstances. *United States* v. *Wells*, 283 U. S. 102, 117.

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[1] Article 43(a)(3), for instance, is directly contrary to the holdings in the *Emery*, *Zonne* and *McCoach* cases, *supra*.

[2] This provision has appeared in substance in the various editions of the applicable regulations ever since the Revenue Act of 1918.

CONCLUSION.

The District Court and the Circuit Court of Appeals correctly applied established principles to the facts in this case. It is respectfully submitted that the petition should be denied for the following reasons: (1) The principles involved have already been established by this Court and no important question is, therefore, presented by this decision, (2) There is no conflict in the decisions of the Courts, and (3) Article 43(a)(5) of Treasury Regulations 64 is not in accord with the proper interpretation of the Revenue Act.

RICHARD F. CLEVELAND,
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Counsel for the Respondent.

October, 1941.

APPENDIX.

[1]Revenue Act of 1935, c. 829, 49 Stat. 1014:

Sec. 105. Capital Stock Tax.

(a) For each year ending June 30, beginning with the year ending June 30, 1936, there is hereby imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of $1.40 for each $1,000 of the adjusted declared value of its capital stock. * * *

[2]Treasury Regulations 64 (1936 Edition):

Art. 41. *Nature and Rate of Tax.*—The tax is an excise tax imposed with respect to carrying on or doing business during a taxable year ending June 30, or any fractional part thereof. It is an excise tax upon the exercise of the privilege of doing business and not on the business itself * * *.

Art. 42. *Doing Business.*—The term "business" is very comprehensive and embraces whatever occupies the time, attention, or labor of men for profit. Accordingly, regardless of the nature of its activities, any corporation organized for profit and carrying out the purpose of its organization is doing business within the meaning of the Act. Similarly, even if not organized for profit, any corporation which nevertheless engages in activities ordinarily carried on for profit is also doing business. It is immaterial whether the activities result in a profit or a loss, whether the corporation has been successful in its enterprise, or that because of unfavorable business

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[1] The provisions of the subsequent capital stock tax statutes are, in so far as relevant, the same as Section 105, supra. Section 401 of the Revenue Act of 1936, c. 690, 49 Stat. 1648; Section 1200 of the Internal Revenue Code.

[2] Substantially to the same effect are the like numbered provisions in the 1938 Edition of Treasury Regulations 64.

conditions, no operations are carried on for a particular period. No particular amount of business need be done, nor is it necessary that the business be continuous throughout the taxable year.

The case is exceptional in which the activities of a corporation organized for profit do not amount to doing business within the meaning of the Act. Such a case is generally limited to one in which the corporation is not pursuing the ends for which organized, i. e., profit.

Art. 43. *Illustrations.* (a) *General.*—In general "doing business" includes any activities of a corporation whether it engages in—

(1) buying, selling, manufacturing, developing, financing, speculating, or otherwise dealing in property of any description;

(2) furnishing services of any character;

(3) leasing or managing properties, collecting rents or royalties;

(4) managing, financing, controlling or directing the operations, performing any function, or, in any other way, aiding or serving the general purposes of any affiliated or related company;

(5) the orderly liquidation of property by negotiating sales from time to time as opportunity and judgment dictate and distributing the proceeds as liquidation is effected—for example, the liquidation of an estate, or of properties taken over from another corporation, or of the shareholders' fractional interests in particular property; • • •.

(b) *Exceptions.*—Ordinarily the exceptions to "doing business" are restricted to limited activities of a corporation, such as—

(2) the distribution of the avails of property and the doing only of such acts as may be neces-

sary for the maintenance of its corporate status in the case in which the corporation either was organized for, or has reduced its activities to, the mere owning and holding of specific property.